Filed 11/10/09 Estate of Hutchinson CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of CATHERINE L. HUTCHISON, Deceased. MARTHA PRICE, Petitioner and Appellant, v. CHRISTOPHER ALVARADO, Objector and Respondent.	G041619 (Super. Ct. No. A241350) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Randall J. Sherman, Judge. Affirmed.

Law Office of John M. Beall and John M. Beall for Petitioner and Appellant.

S.J. Coleman & Associates and Sandra J. Coleman for Objector and Respondent.

* * *

Petitioner Martha Price appeals from the court's order determining the distribution of the estate of Catherine Hutchison.[1] The court ordered one half of Catherine's estate to be distributed to Price (Catherine's daughter), and the other half to respondent Christopher Alvarado and his brother (the sons of Lucinda, Catherine's predeceased daughter). We affirm.

FACTS

In October 2008, Price filed a petition to determine heirs, seeking "a court determination as to who the rightful heirs of [Catherine's] estate are pursuant to the decedent's will . . . ." Catherine's will was apparently over four decades old at the time.[2]

The will stated Catherine was widowed, not married, and had "three now living children, [Lucinda, Martha, and Aaron], whose father is deceased." The will provided that if Catherine died before all three of her children were either age 21 or married (whichever happened first), Catherine's parents were to be appointed guardians of the "then unmarried minor children," or if the parents were unavailable and Lucinda was at least age 21, Lucinda was to be appointed Aaron's guardian.

---

[1] The order is appealable under Probate Code section 1303, subdivision (f). All further statutory references are to the Probate Code.

For clarity and convenience, we sometimes refer to members of the Hutchison family by their first names. We mean no disrespect.

Alvarado argues Price lacks standing to appeal because Price, as the personal representative of Catherine's estate, is not an aggrieved party. Alvarado asserts Price "filed this Appeal as the personal representative of the estate . . . ." A "notice of appeal must be liberally construed." (Cal. Rules of Court, rule 8.100(a)(2).) Price's notice of appeal states, "Price, the duly appointed personal representative of the estate, hereby appeals the order of the court . . . ." It does *not* state Price appeals in her capacity as the estate's personal representative. We conclude Price has standing to appeal.

[2] The record contains only an undated copy of the will. Price's petition states the will's date is March 1, 1965. Alvarado states the will was 41 years old at the time of Catherine's death.

Paragraph 5 of the will provided: "I give my entire estate, including all failed and lapsed gifts to [my parents] in trust, to hold, manage and distribute as hereinafter provided: [¶] A. Distribution of Income and Principal. [¶] 1. The net income from the trust estate shall be distributed in monthly or other convenient installments to, or used for the benefit of each of my said minor children, in such proportions as the Trustees in their discretion shall see fit, until each of my said children shall reach his or her 21st birthday or marry. At such time as each of my said children shall reach his or her 21st birthday or marry, benefits from this trust shall cease as to that child until such time as all of my said children shall have reached their 21st birthday or married. At such time as the youngest of my then living children shall reach his or her 21st birthday or marry, whichever shall be sooner, the Trustees shall distribute, in equal shares, to my then living children the remaining trust estate. [¶] 2. If the payments from this trust to which any beneficiary . . . is entitled, shall be insufficient . . . to provide for his or her reasonable support, care, and education, . . . the Trustees may pay to such beneficiary . . . so much of the principal as they may deem proper or necessary for this purpose. It is my primary intention by this trust to provide income for my youngest child, Aaron . . . , during his minority so as to allow him to maintain the standard of living enjoyed by him at my death."

Price's opening brief states, without any supporting record reference, that Aaron "predeceased the decedent without issue." Our review of the record has uncovered no information concerning Aaron's passing, e.g., his age or marital status at the time of his death. Alvarado's brief states, also without any supporting record reference, that Lucinda "died two months before the Decedent" and had two children (Alvarado and his brother).

After a hearing on Price's petition to determine Catherine's heirs, the court ordered the estate to be distributed in two equal shares — "1/2 to Martha Price and 1/2

to" Lucinda's "two heirs at law," Alvarado and his brother. The court based its ruling on the antilapse statute, section 21110, subdivision (a).

DISCUSSION

At issue is the meaning of the following provision in paragraph 5 of the will: "At such time as the youngest of my then living children shall reach his or her 21st birthday or marry, whichever shall be sooner, the Trustees shall distribute, in equal shares, to my then living children the remaining trust estate." Price contends this provision directs distribution of the residue to the children living *at the time of Catherine's death,* i.e., solely to herself. She concludes the court erred by applying the antilapse statute. Alvarado argues this provision directs distribution of the residue to the children who were alive *at the time the youngest living child reached age 21 or became married*. He concludes the court properly applied the antilapse statute.

Generally, when a transferee "fails to survive the transferor of an at-death transfer," the gift lapses. (§ 21109, subd. (a).) But under the antilapse statute, when the deceased transferee is kindred of the transferor, the transferee's lineal descendants take the gift "in the transferee's place . . . ." (§ 21110, subds. (a) & (c).) If, however, "the instrument expresses a contrary intention or a substitute disposition," the gift to a kindred transferee lapses. (§ 21110, subd. (b).) A survivorship requirement "constitutes a contrary intention." (*Ibid*.) "'Antilapse statutes serve an extremely important function in the law, for they give effect to strong human impulses in some cases and, in others, to what are perceived as highly probable intentions. They prevent unintended disinheritance of one or more lines of descent, by presumptively creating an alternative or substitute gift in favor of the descendants of certain of the decedent's predeceased relatives.'" (*In re Estate of Mooney* (2008) 169 Cal.App.4th 654, 658-659.)

Price contends Catherine expressed "a contrary intention" to application of the antilapse statute, such that the gift to Lucinda lapsed. Price argues the phrase "then living children" in paragraph 5 of the will expresses a survivorship requirement.

We interpret Catherine's will de novo because this case involves no extrinsic evidence. (*Estate of Russell* (1968) 69 Cal.2d 200, 213.) In interpreting a will, we seek first to discern the "intention of the transferor as expressed in the instrument . . . ." (§ 21102, subd. (a).) A will should be interpreted so as to effectuate, where possible, the testator's "general scheme and dominant purpose . . . ." (*Estate of O'Connell* (1972) 29 Cal.App.3d 526, 531.) "Once the testamentary scheme or general intention is discovered, the meaning of particular words and phrases is to be subordinated to this scheme, plan or dominant purpose . . . ." (*Id.* at pp. 531-532.) In addition, separate parts of a will should be harmonized, with all parts construed "in relation to each other . . . to form a consistent whole." (§ 21121.) "The words of an instrument are to receive an interpretation that will give every expression some effect . . . ." (§ 21120.) The words "are to be given their ordinary and grammatical meaning . . . ." (§ 21122.)

We recite again the provision in question here: "At such time as the youngest of my *then living children* shall reach his or her 21st birthday or marry, whichever shall be sooner, the Trustees shall distribute, in equal shares, to my *then living children* the remaining trust estate." (Italics added.) The first reference to "then living children" clearly connotes the children alive when the youngest living child turned 21 or married. The second reference to "then living children" is ambiguous as to the time referent for the word "then." Does the phrase (like the first instance) refer to children living when the youngest child turned 21 or married? Or does it connote children alive when the remainder is distributed, i.e., sometime after Catherine's death?

In determining which interpretation best meets Catherine's intention as expressed in her will, we look at her general testamentary scheme. Catherine's dominant purpose is clearly expressed in the will. As the sole remaining parent of her three

children, she wished to provide for them during their minority. Her overriding purpose was to provide monetary support and ensure a guardian for her children during their minor years should she die during those years. She stated this primary intent with respect to her youngest child, Aaron. Her focus on her children's needs during their youth, should she die during that time period, is reflected in her failure to provide in the will for successor trustees to her parents. (Obviously, if Catherine lived long past her children's minority, her parents might predecease her and be unavailable to act as trustees for distribution of the estate.) Consistent with Catherine's focus on the children's minority, she gave her parents discretion to distribute the trust income for the benefit of each child who was under age 21 and unmarried. Once all the living children had reached age 21 or married, the trustees were directed to distribute the remainder of the estate equally to the then living children. Distribution, of course, was contingent on Catherine's death. But, as described above, the will's specific provisions focused only on the contingency of Catherine's dying during a child's minority.

Under either party's propounded interpretation of the will, a child could be disinherited. Under Price's interpretation, a child who predeceased Catherine would lose their gift. Under Alvarado's reading, a child could lose a gift only by dying while another child was under age 21 and single. Alvarado's reading is consistent with Catherine's goal to use her estate to support her children during their minority. In contrast, nothing in the will supports an interpretation that Catherine intended to disinherit Lucinda *decades* after the youngest child turned 21.

"Preference is to be given to an interpretation of an instrument that will prevent . . . failure of a transfer . . . ." (§ 21120.) The antilapse statute recognizes that, if a testator means to disinherit a predeceased child, the testator will generally state a reasonably clear substitute disposition (such as a gift over clause) or other expression of an intention to override the antilapse law. (See Cal. Law Revision Com. com., 54A West's Ann. Prob. Code (2009 Supp.) foll. § 21110 p. 189 [regarding substitute gifts,

"care must be taken not to ascribe to the transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by the transferor"].) Here, the phrase "then living children" does not state a reasonably clear contrary intention to the antilapse statute. Rather, Catherine's general testamentary scheme, as well as all parts of the will taken together, support the interpretation that the remainder is to be distributed to the children (or their issue) who were then living when the youngest living child turned 21 or married. Furthermore, under this interpretation, the phrase "then living children" has the same meaning and time referent in both places that it appears in the provision in question.

The court correctly ordered the remainder of Catherine's estate split in equal parts to Price, on the one hand, and the sons of Lucinda, on the other.

DISPOSITION

The order is affirmed. Respondent shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.